BARBARA LAWALL
PIMA COUNTY ATTORNEY
CIVIL DIVISION
Regina L. Nassen, SBN 014574
Andrew L. Flagg SBN 025889
Deputy County Attorneys
32 North Stone Avenue, Suite 2100
Tucson, Arizona 85701
Telephone: 520-724-5700
Regina.Nassen@pcao.pima.gov
Andrew.Flagg@pcao.pima.gov
Attorneys for Defendants

ARIZONA SUPERIOR COURT
PIMA COUNTY

Richard Rodgers, et al.,

Plaintiffs,

vs.

Charles H. Huckelberry, et al.,

Defendants.

Case No. C20161761

REPLY IN SUPPORT OF SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING COUNTS 3 AND 4

AND

RESPONSE TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT REGARDING COUNTS 3 AND 4

(The Honorable Catherine Woods)

Defendants (collectively, "the County") reply in support of their second motion for partial summary judgment regarding counts 3 and 4 and respond to Plaintiffs' cross-motion for summary judgment on those counts.

Memorandum of Points and Authorities

Two faulty premises largely prop up Plaintiffs' argument that they (and not the County) should have summary judgment on counts 3 and 4: first, that the Pima County

Board of Supervisors' ("the Board's") decision to procure services under A.R.S. § 34-606 is entitled to no deference; second, that the County actually procured the challenged services in August 2015, not January 2016. As a matter of law, though, the Board's decision is entitled to substantial deference because its determination that the public interest justified departing from the normal Title 34 procurement requirements was a policy—a political—determination, one that involved the weighing of numerous factors for which there is no objective measure or formula. That is surely not a job for this Court to do independently, as Plaintiffs suggest. And, also as a matter of law—but also of undisputed fact—the County did not procure Swaim's and Barker's services until the Board awarded the contracts on January 19, 2016.

With these foundational premises exposed as flawed, Plaintiffs' argument topples. It is the County that is entitled to summary judgment on counts 3 and 4.

A. The Board's determination that existing circumstances justified a departure from normal procurement requirements under A.R.S. § 34-606 is entitled to substantial deference.

Plaintiffs and the County can at least agree on this much—when Title 34 applies (and there has been no dispute that it does here), it is mandatory. *See, e.g., Achen-Gardner, Inc. v. Superior Ct.*, 173 Ariz. 48, 50-51 (1992). But Title 34 itself contains the authorization in § 34-606 that is at the heart of this case. So a government entity that procures under § 34-606 complies with Title 34, so long as the procurement is justified under § 34-606's language. It doesn't help to italicize the "shalls" in other portions of Title 34 (Response,[1] at 2). Nor does it help to emphasize that the State generally determines what is in the public interest or that the Legislature enacted Title 34 (Response, at 4-5), because in doing so the Legislature also enacted § 34-606, which delegates to all "agents" (including counties) the authority to procure services under the

[1] "Response" refers to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment and Cross-Motion for Summary Judgment Regarding Counts 3 and 4.

conditions set forth in that statute.

It is, of course, true that municipalities and counties generally get their authority from the Legislature and must comply with the statutes providing and constraining that authority, including Title 34. *See e.g.*, *Associated Dairy Prods. Co. v. Page*, 68 Ariz. 393, 395 (1949). And, in many instances, Title 34 compliance is basically ministerial and therefore does not require or permit the exercise of discretion. Just as one example, A.R.S. § 34-201(D) allows agents to construct certain public-works projects with their own workers if the "total cost of the work" is less than certain inflation-adjusted dollar amounts. All one really needs to know to decide whether an agent has complied with that subsection is the total cost of the work and the current inflation-adjusted dollar amount. Getting the numbers right might require math skills superior to those of your undersigned, but it's ultimately bean counting—the task is ministerial. If the total cost of the work exceeds the dollar limit, and the agent performs the work with its own staff, the agent has violated Title 34.

Section 34-606 is different. First, it gives agents the *option* of making "emergency procurements" when warranted. § 34-606 ("Notwithstanding any other provision of this title, an agent *may* make or authorize others to make emergency procurements . . . .") (emphasis added). An agent must, in any particular instance, decide whether to *exercise* that option. And the language describing the circumstances in which such procurements are permitted obviously requires an agent to make policy determinations as part of that decision-making process. In order to decide whether an "emergency procurement" is warranted, an agent must decide whether "a threat to the public health, welfare or safety exists or [whether] a situation exists that makes compliance with [Title 34] impracticable, unnecessary, or contrary to the public interest." *Id.* That requires determining what is in the public's interest, how strong that interest is, whether the existing circumstances threaten that interest, and whether that threat is substantial enough to overcome the

public's competing interest in a competitive procurement process. There is no formula for doing that; it necessarily requires the exercise of discretion. Each agent is best suited to make those determinations, and is accountable to its own constituents for its decisions. Plaintiffs' interpretation of the statute—that an agent may make the emergency procurement but somebody else (the State? this Court? who knows?) can later second-guess whether the circumstances warranted the procurement—is fundamentally at odds with the statutory language and scheme. The Legislature, by specifically delegating to agents the authority to make the procurement decision, has necessarily also authorized the agents' exercise of discretion when doing so. And such discretionary policy decisions by local governmental bodies must be respected by courts in the absence of some sort of abuse, fraud, or conflict of interest. *See* *Sulphur Springs Valley Elec. Co-op., Inc. v. City of Tombstone*, 1 Ariz. App. 268, 272 (1965) (discretionary policy decision of local government will be upheld unless discretion "unquestionably abused").[2]

Unsurprisingly, courts in other jurisdictions have squarely concluded that, when a local government is authorized to dispense with statutory procurement requirements, it has a measure of discretion when doing so. *See* 10 McQuillin, *The Law of Municipal Corporations*, § 29:39 (3d ed.) (statutory authority to "dispense with the requirement of submitting contracts to competitive bidding[,] . . . when it is granted, is ordinarily deemed a discretionary, nondelegable power"); *Sloan v. Greenville Cty.*, 590 S.E.2d 338, 351 (S.C. App. 2003) (where contract done by ordinance was exempt from competitive-bidding requirements, decision to procure by that method was "a function of the County Council's discretion, the exercise of which they are accountable for as publicly elected

[2]Plaintiffs attempt to distinguish *Sulphur Springs* on the ground that it addressed "a question of policy rather than legal duty." (Response, at 5.) But, as explained above, § 34-606 delegates agents the authority to make a discretionary policy decision. Accordingly, the same standard applies here.

officials"); *cf. also* Bana Elec. Corp. v. Bd. of Educ., 194 N.Y.S. 2d 657, 659-60 (Sup. Ct. 1959) (noting school district's discretion to determine the scope of a public project); J.F. Ahern Co. v. Wisconsin State Bldg. Comm'n, 336 N.W.2d 679, 691-92 (Wis. App. 1983) (selection of a particular project-delivery method was discretionary and reviewable under an "arbitrary and capricious standard"). Indeed, a New York appellate court, in a case cited in the County's Motion (at 6), expressly concluded that a municipality had discretion to exercise authority to procure under an "impossible or impracticable exception" even in circumstances that are not a traditional "emergency." Imburgia v. City of New Rochelle, 645 N.Y.S.2d 111, 114 (App. Div. 1996).

B. Under an appropriately deferential standard, the Board's selections of Swaim and Barker must be upheld.

As explained above, the Board had broad discretion in deciding whether to apply § 34-606 to select Swaim and Barker. Its decision to do so was not an "unquestionable abuse" of that discretion, so it must be upheld.

1. "Or" means "or."

Plaintiffs contend that the *pari materia* rule "requires that 'impracticable, unnecessary, or contrary to the public interest' mean something of the same order of urgent necessity or near impossibility." (Response, at 3.) But that construction effectively ignores the Legislature's use of the word "or"; at the very least it reads "or a situation exists . . ." to mean "or, in other words, a situation exists . . . ." Either construction is at odds with fundamental principles of statutory construction—the Court must *both* give meaning to every word in the statute *and* avoid a construction that reads words into the statute that aren't there.[3] *See, e.g.*, Bilke v. State, 206 Ariz. 462, 464, ¶ 11 (2003) ("The

[3]Plaintiffs cite an Attorney General Opinion, I96-007, in support of their argument. But that opinion construed a similar statute, A.R.S. § 41-2537, *in conjunction with* an administrative rule that specified the types of emergencies in which the statute would be

court must give effect to each word of the statute."); *see also City of Tempe v. Fleming*, 168 Ariz. 454, 457 (App. 1991) ("As a rule of statutory construction, we will not read into a statute something which is not within the manifest intent of the legislature as indicated by the statute itself.").

Plaintiffs argue that the County's interpretation makes "threat to public health, welfare or safety" redundant, but that's not quite right. The "public health, welfare or safety" language provides specific, albeit broad, scenarios in which emergency procurements are justified, and the "or if a situation exists" clause adds a more general "catch-all" to cover situations the Legislature might not have thought of. Moreover, even were there some redundancy, the Court would not construe the statute to avoid it in favor of nullifying the use of the word "or" and everything after it. (What, after all, is "of the same order" as a "threat to the public health, welfare or safety" that is not a "threat to the public health, welfare or safety"?) The "hesitancy to construe statutes to render language superfluous does not require [this Court] to avoid surplusage at all costs. It is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction that threatens to render the entire provision a nullity." *See United States v. Atl. Research Corp.*, 551 U.S. 128, 137 (2007).

At the end of the day, the Legislature used broad, discretion-conferring language in creating the exception in § 34-606. This Court should not judicially limit that language—if the Legislature desires to do that, it can.

---

applied. 1996 WL 340788, *3. And, in any event, Attorney General Opinions are not binding, *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 469, ¶ 34 (App. 2007), and to the extent the cited opinion can be read to require a "threat to the public health, welfare or safety" to justify any emergency procurement, its analysis suffers from the same flaw as that of Plaintiffs, in that it renders the language following that meaningless.

2. The facts easily justify the conclusion that the Board did not unquestionably abuse its discretion in selecting Swaim and Barker.

As explained in the County's motion, the Board determined that keeping World View here was in the public interest, as it was authorized to do under A.R.S. § 11-254.04. Its determination that, in order to do so, it had to select Swaim and Barker to comply with World View's deadline, was supported by evidence before it, and therefore was not an unquestionable abuse of discretion.

Plaintiffs attempt to counter this argument in basically three ways, but none works. First, they argue that the procurement really happened in August of 2015. But this is neither factually nor legally accurate—and it wouldn't matter if it was. The County can only procure services through its authorized agents—in this case, that is the Board. (*See* RSOF[4] ¶ 3.) And it is undisputed that the Board did not consider or act on the proposed selection of Swaim and Barker until January 19, 2016. (DSOF[5] ¶ 1; PSOF[6] at 1, ¶ 1.) Nor is the assertion factually accurate. As the County has explained, World View began consulting with Swaim, and Swaim contacted Barker. (DSOF ¶¶ 16-17; PSOF at 1-2, ¶¶ 16-17.) All the discussions that occurred in 2015 were preliminary and geared toward determining whether the project was even possible. (DSOF ¶ 20; PSOF at 2, ¶ 20.) Plaintiffs would have the Court adopt the rule that, from the first of these preliminary discussions, the County "procured" the services of Swaim and Barker. But so broad an argument would brand as procurement violations all sorts of preliminary discussions about the scope and feasibility of a project. For example, as noted above, agents may not

---

[4]"RSOF" refers to the County's Response to Plaintiffs' Separate Statement of Facts in Support of Their Cross-Motion for Summary Judgment.

[5]"DSOF" refers to the County's Statement of Facts in Support of Second Motion for Partial Summary Judgment Regarding Counts 3 and 4, filed May 4, 2018.

[6]"PSOF" refers to Plaintiffs' Combined Controverting Statement of Facts and Separate Statement of Facts filed May 29, 2018.

use their own personnel to construct buildings above a certain cost threshold. A.R.S. § 34-201(D). Does this mean that a county's facilities-management department can't ask one of its architects to take a preliminary look at whether a building—one that is expected to cost in excess of the statutory threshold—would work on a particular parcel of land, or ask another of its employees to do a preliminary cost estimate to see if the project is financially feasible or needs to be scaled back? Of course not.

Next, Plaintiffs contend the County did not comply with § 34-606's requirement that it use "such competition as is practicable under the circumstances." (Response, at 12-13.) But the record demonstrates not only that the Board concluded that *no* competition was practicable under the circumstances, but that this decision was at least arguably justified and therefore not an unquestionable abuse of discretion. It is clear that World View conditioned its acceptance on a move-in deadline of approximately November 2016. (DSOF ¶¶ 35-36; PSOF at 2, ¶¶ 35-36.) It is also at least arguable that *any* competitive process, even had it started on December 23, 2015, the date World View committed to the project,[7] would have delayed things too long. It is undisputed that the typical timeframe for public buildings is 18-24 months. (DSOF ¶ 41; PSOF at 3, ¶ 41.) And this was an unusual project. Yet, the time period from December 23, 2015 to occupancy was just 12 months. The Board could have reasonably concluded that *no* competition was practicable under those circumstances.

Plaintiffs cite *Innovation Development Enterprises of America, Inc. v. United States*, 108 Fed. Cl. 711 (2013), contending that delaying a project until it became urgent does not excuse compliance with normal procurement requirements. (Response, at 9-10.)

[7]Plaintiffs give short shrift to the County's emphasis on that date, but before December 23, 2015, there was no assurance that the proposal would move forward. It is like saying that the minute a County department begins to conceptually consider a new building, the project has begun, irrespective of whether the funding or political will for the project will ever materialize.

But that case is meaningfully different—both factually and legally—from this one. Factually, the Air Force was on notice that it would need a new contract for over *six years*, but made no effort to procure a new contract until it slapped together a sole-source "bridge contract" two weeks after the prior contract expired. *Id.* at 717-18. Indeed, a potential competitor had even contacted the Air Force about the contract during the final year of the prior contract's term, with no apparent impact. *Id.* at 718. The Air Force even *conceded* two procurement violations. *Id.* at 719. Here, of course, County staff didn't even know there would *be* a project to move forward with until December 23, 2015, when World View committed to the October proposal. (DSOF ¶¶ 29, 35; PSOF at 2, ¶¶ 29, 35.) And *Innovation Development* is legally different because it was applying a very different regulatory scheme. In that case, the applicable statute expressly provided that "lack of advance planning" could not justify a sole-source award. *Innovation Dev.*, 108 Fed. Cl. at 727. And the proffered justifications for the procurement included a regulation applicable only in cases of "unusual and compelling urgency." *Id.* at 729. As explained above, § 34-606 is quite different—it contains no restriction on emergency procurements that might result from a lack of advance planning, and it applies in a broader set of circumstances than "unusual and compelling urgency."

Finally, Plaintiffs contend that World View's timeframe was merely its "private interest," not the public interest. (Response, at 13-14.) The statutes and the record show otherwise. The Legislature has expressly concluded that spending on economic development—here, keeping World View in Pima County—*is* in the public interest; that's why counties can do it. *See* A.R.S. § 11-254.04. And the Board made findings here that World View would *not* stay in Pima County had the Board not entered into the Lease Purchase and Space Port Operating Agreements. (DSOF **Exhibit 20**, § 1.7; DSOF **Exhibit 21**, § 1.6.) The record supports those findings. Accordingly, meeting the deadline was in the public interest, not merely World View's "private interest."

C. Even were Plaintiffs entitled to some relief, they would not be entitled to injunctive relief.

Last, Plaintiffs take issue with the County's contention that injunctive relief would be futile, arguing that the Court could debar Swaim and Barker from future work on the Facility and Launch Pad.[8] But *World View*, not the County, is responsible for repair and maintenance of the Facility and Launch Pad. (DSOF, **Exhibit 20**, §§ 7.5, 8 (World View responsible for repair, maintenance, and alteration of the Facility); DSOF **Exhibit 21**, § 4.7 (World View responsible for repair and maintenance of the Launch Pad).) Because the County has no obligation to maintain the Facility and Launch Pad, the County naturally can't be enjoined from using any particular contractor or consultant to do maintenance. And a nonparty like World View cannot be enjoined when no party can be enjoined. *Bussart v. Superior Ct.*, 11 Ariz. App. 348, 351 (1970).

For similar reasons, this Court lacks authority to issue an injunction affecting Swaim and Barker (also nonparties). In addition, debarment of a nonparty may also present a due-process problem. *See Golden Day Schs., Inc. v. State Dep't of Educ.*, 99 Cal. Rptr. 2d 917, 926 (App. 2000). That's not the County's argument to make; it would be Swaim's and Barker's, were this Court to issue an order debarring them without giving them notice and an opportunity to be heard. But it is perhaps surprising that an organization like the Goldwater Institute, which advocates for those asserting a "right to

[8]In a footnote, Plaintiffs contend that an explosion caused damage to the Facility, which "was paid for by the County's insurance." While the memorandum they cite indeed refers to "insurance," it should be clear to anyone who has read the World View agreements in detail or has a working knowledge of how Pima County operates that it was *World View's* insurance that covered the loss. (*See* DSOF **Exhibit 20**, § 7.6 (World View responsible for repairing damage to Facility caused by casualty), § 10 (insurance requirements).) Indeed, Pima County doesn't even have traditional "insurance" for losses of that size—instead, it is self-insured. *See generally* Pima Cty. Code ch. 3.04.

earn a living,"[9] would so cavalierly ask a court to issue an order restricting the ability of private companies to do business without so much as attempting to ensure those companies received due process.

D. Conclusion

The Legislature vested the County with discretionary authority to make emergency procurements under circumstances that render compliance with the normal process "impracticable, unnecessary, or contrary to the public interest." The County did so here, and on the undisputed facts before the Court, the Court cannot say the County unquestionably abused its discretion. Accordingly, the County is entitled to summary judgment on Counts 3 and 4, and Plaintiffs are not.

RESPECTFULLY SUBMITTED June 18, 2018.

BARBARA LAWALL
PIMA COUNTY ATTORNEY
By: /s/ Andrew L. Flagg
Regina L. Nassen
Andrew L. Flagg
Deputy County Attorneys

[9] *See, e.g.*, Jon Riches, *Restore All Americans' Right to Earn a Living*, https://indefenseofliberty.blog/2018/04/05/restore-all-americans-right-to-earn-a-living/.

BARBARA LAWALL
PIMA COUNTY ATTORNEY
CIVIL DIVISION

BARBARA LAWALL
PIMA COUNTY ATTORNEY
CIVIL DIVISION

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2018, I electronically transmitted the attached document to the Clerk's Office using the TurboCourt System for filing and transmittal of a Notice of Electronic Filing to the following TurboCourt registrants:

Honorable Judge Catherine Woods
Judge of Superior Court
110 W. Congress
Tucson, AZ 85701
Assigned Judge

Timothy Sandefur, Esq
Veronica Thorson, Esq.
Goldwater Institute
500 E. Coronado Rd.
Phoenix, AZ 85004
Attorneys for Plaintiffs

By: Marilee Weston